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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BILL LAWRENCE GALLUP,

Defendant and Appellant.

B272258

Los Angeles County
Super. Ct. No. YA055822

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed and remanded for resentencing.

Medrano and Carlton, Manuel Medrano; Law Offices of A. William Bartz, Jr. and Arthur William Bartz, Jr. for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Bill Lawrence Gallup of the first degree murder of his wife Oliva with a gun. On appeal, Gallup does not complain of any error in his jury trial for murder. Rather, he contends the trial court erred in finding him competent to stand trial after an earlier court trial on competence. Gallup also asserts there was no adequate waiver of his right to a jury trial on competence, and that the prosecution should have renewed its plea offer of 14 years on a manslaughter charge after the trial court found him competent. We find no error and affirm Gallup's conviction. We remand for the trial court to exercise its discretion whether to strike the firearm enhancement.

FACTS AND PROCEDURAL BACKGROUND

1. Gallup shoots his wife, then himself

In July 2003 Oliva G. was living in Manhattan Beach with her husband Bill Gallup, her sister Maria,¹ and her niece. Oliva and Gallup had been married for 30 years. On July 5, Oliva and Maria came home in the late afternoon after going to the bank, helping a friend clean a house, and shopping. They heard loud music coming from upstairs. Oliva went upstairs and either turned down the music or asked Gallup to turn it down. Gallup either did not turn the music down or turned it up again and Oliva went back upstairs. Maria heard Oliva and Gallup arguing; then she heard gunshots.

Manhattan Beach Police Officer Tony Presgraves was working that evening. He heard a radio call of a shooting and went to the Gallup home. Presgraves found Gallup lying on his back on a bed; there was a lot of blood on him and the bed. Presgraves got closer and saw a revolver lying on the bed next

¹ We refer to the victim and the witness by their first names. (Cal. Rules of Ct., rule 8.90(b)(4).)

to Gallup, about four inches from his hand. Gallup appeared to have been shot in the face.

At first, Presgraves thought Gallup was dead. Then Gallup opened one eye and started to gasp for air. Paramedics arrived within moments and took Gallup to Harbor-UCLA hospital. Gallup had a blood alcohol level of something between .166 and .24.

Police and paramedics found the victim Oliva lying on the floor in a pool of blood. She appeared to have gunshot wounds to her face, the back of her head, and her chest. She wasn't breathing.

An autopsy revealed Oliva had been shot in the head at close range. She also had been shot in the center of her chest. That shot damaged a number of Oliva's internal organs, including her liver, stomach, and spleen.

2. The charges, and twelve years of pretrial proceedings

The People charged Gallup with Oliva's murder. The People alleged Gallup personally and intentionally discharged a firearm causing Oliva's death. A preliminary hearing was held in March 2004 and the court held Gallup to answer. The People filed an information and the court arraigned Gallup in April 2004.

At a pretrial in November 2004, Gallup's counsel declared a doubt as to his competence under Penal Code section 1368.² The court therefore declared a doubt as well, and suspended proceedings. The court appointed two doctors to evaluate Gallup, Ronald Fairbanks and Robert Brook. In late January 2005, the court appointed a third doctor—Sanjay Sahgal—to evaluate

² Statutory references are to the Penal Code unless otherwise noted.

Gallup.³ At some point, the court appointed a fourth doctor, Kyle Boone. In March 2005, the court appointed Dr. Marshall Cherkas to review Dr. Boone's report.

On March 3, 2006, the parties appeared before the trial court for a competency trial. Counsel told the court they were "prepared to submit on the previous psychological evaluations conducted by" Drs. Fairbanks, Brook, Boone, and Cherkas.⁴ The parties agreed the court could decide the matter without a jury. Defense counsel said he believed—based on the reports—that Gallup would "in all likelihood never regain competency" because of the damage to his frontal lobe.

The court stated, "Both sides having submitted on the reports, the court finds that the defense has demonstrated by a preponderance of the evidence that Mr. Gallup is incompetent and that he's unable to assist counsel in his defense." The court ordered Gallup transferred to Patton State Hospital. Patton admitted Gallup on May 30, 2006. In August 2006, Patton apparently concluded Gallup had been "restored to competency." Defense counsel disagreed and filed a "notice of opposition to certification of defendant's competency." Proceedings remained

³ It turned out Dr. Sahgal already had been appointed at defense counsel's request under Evidence Code section 730. The court determined Dr. Sahgal's report did not contain any privileged information.

⁴ The record does not reflect whether the court also considered Dr. Sahgal's report. The record on appeal does not contain the 2004-2005 reports of Drs. Fairbanks, Brook, Boone, or Cherkas. Later doctors' reports admitted into evidence at the 2015 competency trial state that those evaluators did read the 2004-2005 reports.

suspended, and the matter was continued a number of times over the next 16 months.

On December 13, 2007, the parties and the court agreed Gallup would be transferred to a skilled nursing facility in the “state mental hospital system.” The minute order states, “Defendant remains incompetent, and the court finds that the defendant has no reasonable likelihood of ever regaining his competence to stand trial.” The court ordered that Gallup be placed at Napa State Hospital but he was sent back to Patton State Hospital instead.

Patton readmitted Gallup in October 2008. In March 2009 Patton again certified Gallup as competent. The record does not reflect what happened next, but it appears the court did not deem Gallup competent at that point.

In the meantime, between 2007 and 2012, there was considerable discussion of a conservatorship for Gallup. Gallup did not qualify for a so-called Murphy conservatorship,⁵ so in November 2010 the court granted a temporary probate conservatorship over Gallup and his assets. Apparently there

⁵ See Welf. & Inst. Code, § 5008, subd. (h)(1)(B). A Murphy conservatorship is available under the Lanterman-Petris-Short Act (Welf. & Inst. Code, §§ 5000-5599) for a defendant who has a pending felony case involving death or great bodily harm to another, has been found mentally incompetent under Penal Code section 1370, and “represents a substantial danger of physical harm to others by reason of a mental disease, defect, or disorder.” (Welf. & Inst. Code, § 5008, subd. (h)(1)(B)(i) and (iv).) Murphy conservatorships are named for the legislator who sponsored the legislation. (*Jackson v. Superior Court* (2016) 247 Cal.App.4th 767, 771.) Counsel told the court Gallup did not qualify for a Murphy conservatorship because he did not have an Axis I diagnosis of a “major mental health disorder.”

was a conservatorship proceeding in the probate court as well. After Gallup's home was sold, generating funds for his care, he was released to a residential care center.

In November 2014, the trial court apparently received an August 2014 report that Dr. Gordon Plotkin had done for the mental health court opining that Gallup was competent. The court appointed Dr. Lydia Bangston at defense counsel's request to evaluate Gallup's competence. In a January 2015 report, Dr. Bangston opined Gallup was not competent. The court appointed Dr. Sanjay Sahgal (again) to evaluate Gallup. Dr. Sahgal opined Gallup was not competent. On May 4, 2015, the court appointed a fourth doctor, Bruce H. Gross, to conduct an evaluation.⁶

In April 2015 the court set a court trial on competency for mid-June 2015. The trial was continued to August and then to September on defense motions.

3. *The court trial on competence*

a. The testimony at trial

The court trial finally began in mid-September 2015. It continued into November. As Gallup bore the burden of proving his incompetence, the defense expert witnesses testified first.⁷

i. Psychiatrist Sanjay M. Sahgal

Dr. Sahgal wrote a report dated March 18, 2015. Sahgal concluded Gallup was not mentally competent to stand trial because he was "severely hampered in his ability to cooperate

⁶ If Dr. Gross prepared a report, it apparently was not introduced into evidence; there is no report by Dr. Gross in the record on appeal.

⁷ *People v. Buenrostro* (2018) 6 Cal.5th 367, 387 (*Buenrostro*); § 1369, subd. (b)(1).

effectively and rationally to assist with his own defense” as a “direct result of frontal lobe brain injury.” Sahgal acknowledged Gallup’s inability to remember what transpired during the shooting did not render him incompetent. The problem, Sahgal wrote, was Gallup, “without any conscious intention to deceive, provide[d] different and equally confident accounts of his affirmative lack of involvement in the crime.” Sahgal noted Gallup gave him three different versions of what happened that evening: (1) his sister-in-law shot Oliva and then him; (2) a “burglar or some criminal” did it; and (3) it was probably an accident.

At trial, Sahgal elaborated on his report. He testified he interviewed Gallup for about an hour. Sahgal said Gallup had “a very thorough understanding of the nature and purpose of the legal proceedings against him.” But “tipping the balance” on Sahgal’s opinion on competency was “a curious aspect of the interview”: Gallup “demonstrated signs of confabulation.” A person who confabulates “can invent stories or accounts of past events unconsciously.” Sahgal stated, “It seems much more likely that he is engaging in confabulation than that he is either being a very inconsistently clumsy manipulator or a very sophisticated malingerer of the esoteric clinical phenomenon. But I don’t know with any certainty.”

Sahgal was asked about his 2005 evaluation of Gallup. Sahgal testified he did not remember that earlier report. In the 2005 report, Sahgal had opined Gallup was competent. Sahgal noted “no significant cognitive deficits evident on clinical examination”; he wrote, “[Gallup] appears to be fully capable of cooperating in a rational manner with counsel at this time.” Sahgal’s 2005 report concluded “the defendant clearly demonstrates a level of cognitive ability, social engagement,

and emotional stability to rise well above the threshold for mental competency.”

Sahgal explained the discrepancy between his two opinions 10 years apart: in the first interview, he did not ask Gallup what had happened; in the second interview he did. Sahgal said, “Without asking him about the actual offense, there would be no way for me to expose his confabulating behavior, because it only pertains to the period of his amnesia and his statements about the facts of the case.” Sahgal added it was possible that Gallup’s mental functioning may have changed in the intervening years.

ii. *Psychologist Lydia Bangston*

Dr. Bangston wrote a report dated January 9, 2015. Bangston opined Gallup was not competent to stand trial because “problems with confabulation and[,] ultimately, suspiciousness and paranoia, interfere with his ability to work in a rational way with his attorney on his defense.” Bangston wrote, “He is rigid and uncompromising about his legal situation, and exhibits an inability to reasonably consider the facts of his case, despite his amnesia.”

At trial, Bangston testified she interviewed Gallup for about an hour. Bangston said Gallup has a “neurocognitive disorder due to brain injury”; as a result, “he exhibited significant problems with memory and with his ability to take in information and use it to come to conclusions, to make decisions, and to reason things out.”

On cross-examination Bangston said she had not seen the 16-page report by Dr. Dominique Kinney, who administered a number of tests to Gallup in 2008. Bangston admitted she had not discussed possible defense strategies with Gallup because she “didn’t want him to impeach himself” or say something incriminating. Bangston also admitted that a lot of her opinion

about Gallup's inability to discuss defense strategies came from her conversations with defense counsel.

The prosecutor asked Bangston if Gallup's rigidity or unwillingness to discuss anything other than his professed innocence was "just a result" of him being stubborn. Bangston answered, "Well, it could be that he . . . probably is a stubborn person. But at the time, that wasn't what I was thinking of." Bangston acknowledged that Gallup "said that he and his wife had a good relationship and that they didn't fight, even though there was a lot of evidence" that they did. Bangston also said Gallup "denied abusing alcohol even though there were indications that he was a pretty heavy drinker before this all happened."

The court inquired about Gallup's statement to Bangston that he had a drink on the day of the shooting but wasn't drunk. The court asked, "So doesn't that indicate that he has some recollection of something on the day of this incident?" Bangston answered, "You know, I didn't think about it that way, but I guess that he—if he has that recollection. But that is odd."

iii. *Psychologist Craig R. Lareau*

Dr. Lareau wrote a report dated March 19, 2015. Lareau interviewed Gallup for three hours. Lareau found "notable" Gallup's "frustration that his attorneys continue to challenge his competency to stand trial, asserting that he wants to go to trial because he believes he will likely be acquitted." Lareau stated, "[A]ll of Mr. Gallup's present psychological challenges are related to a very circumscribed area of . . . compromised executive functioning involving topics for which he has amnesia." When "addressing things that he cannot remember," Lareau wrote, Gallup "confabulates (i.e., makes things up that he believes are true)." Gallup's attorneys told Lareau Gallup "often changes his story, sometimes dramatically so, yet he is convinced that he has

not done so.” Lareau opined Gallup was unable to cooperate with his attorney and therefore was incompetent to stand trial.

At trial Lareau testified Gallup’s cognitive functioning for the most part was intact. “He had decent memory” and was “focused, relevant.” But, Lareau said, when asked about the offense, Gallup “started describing things” of which he could have no memory given his amnesia and provided “different theories as to what must have happened.” Lareau testified, “Mr. Gallup appears to engage in significant confabulation regarding this one circumscribed time for which he has amnesia.” Lareau continued, “[W]e would say that for that period of time he is generating new false memories that he truly believes at that time, to fill in the blanks for things that his brain hasn’t actually recorded.” In Lareau’s opinion, Gallup was “unlikely to ever regain competence to stand trial.”

On cross-examination, Lareau admitted Gallup told him he remembered events “right up until the time of the shooting.” Lareau had not included that in his report, and he did not produce his notes to the prosecution until the beginning of his cross-examination, six months after he wrote the report. Lareau said he didn’t know if what Gallup told him was true; he then said what Gallup told him about that day was confabulation rather than real memories.

The defense rested. Trial resumed in November 2015. The prosecution called three experts:

iv. *Psychologist Martin D. Lloyd*

Dr. Lloyd wrote a report of his “psychological consultation” dated December 5, 2008. Gallup was at Patton State Hospital at the time. Lloyd interviewed Gallup twice for a total of two and a half hours. Lloyd described Gallup as “fully oriented,” “completely appropriate,” “friendly and cooperative,” and “upbeat, even jovial.” His “[t]hought processes” were “linear

and coherent.” Lloyd reviewed the results of the testing Dr. Kinney had done.

Lloyd wrote, “[T]he neurological damage caused by the gunshot wound to [Gallup’s] head does not presently appear to be causing any significant neurocognitive deficits.” Lloyd did note, however, Gallup’s confabulation and “replacement” memories. Nonetheless, Lloyd opined, Gallup was competent to go to trial.

Lloyd wrote Gallup “demonstrated a strong factual understanding of criminal proceedings.” At defense counsel’s request, Lloyd did not ask Gallup about any of the details in the police report. Lloyd opined, however, that Kinney’s testing “suggest[ed] that Mr. Gallup would likely be able to remember the details of the police report if they were reviewed with him.”

At trial, Lloyd testified he “had relatively little information about the degree to which Mr. Gallup was confabulating” because defense counsel declined to “share the specifics of that” based on privilege. Lloyd noted, however, “there was sufficient forensic evidence to reconstruct circumstances of the offense, even if Mr. Gallup did not remember or even if he had confabulated aspects of that time period.” Lloyd testified that Dr. Lareau was his supervisor at the time, and he concurred with Lloyd’s opinion that Gallup was competent.

On cross-examination Lloyd admitted that—had he had the opportunity (as Dr. Sahgal had) to discuss with defense counsel Gallup’s “ability to work with him on strategy”—that might have altered his opinion. Lloyd stated, “It’s hard to say for certain.”

v. *Psychologist Dominique Kinney*

Dr. Kinney prepared a report entitled Focused Neuropsychological Assessment dated December 12, 2008. Gallup was about two months into his second stay at Patton at the time. Kinney wrote Gallup’s treatment team had “requested a neuropsychological evaluation to determine what

cognitive abilities remain intact to determine if he has the requisite cognitive ability to attain trial competency.” Kinney emphasized her evaluation was “not a competency assessment.”

Kinney listed the tests she had given Gallup and the reports she had read. She noted his Axis I diagnoses were “cognitive disorder, NOS” (not otherwise specified) and “alcohol dependence.” Kinney wrote that, overall, Gallup had “far more areas of intact cognition than areas of impaired cognition.” His “overall performances on tests of attention, language, memory, and executive functions were all within the average range.”

Kinney wrote that confabulation was not “still a problem for Mr. Gallup when he is engaged in learning new information.” But, Kinney said, Gallup had told her “he experienced post traumatic amnesia beginning 24 hours before the gunshot wound and up to one month after the injury.” Accordingly, in Kinney’s view, it was “extremely unlikely that he [would] be able to accurately recall the events immediate[ly] surrounding the time of the injury and the alleged crime.”

vi. *Psychiatrist Gordon Plotkin*

Dr. Plotkin wrote a report dated August 25, 2014. Before interviewing Gallup, Plotkin spoke with staff at the care center where Gallup had been living for about two years. After interviewing Gallup, Plotkin noted Gallup “likely was still suffering from brain inflammation and injury” when he first was released from the hospital, “which may have more significantly interfered with executive functioning, communication, memory, and other frontal lobe-type deficits.” Plotkin continued, “Over time, and there has been a significant amount of time, he appears to have resolved most of these deficits.” Plotkin wrote Gallup “had an excellent knowledge of the courtroom procedures, participants, plea bargaining, potential penalty, prosecution case, expected outcome, and

even complex legal terms such as Miranda and 5th amendment rights.”

Plotkin continued: “Irritability and poor judgment (in his case), may be related to personality characteristics and/or frontal lobe injury, but did not appear to cause deficits in his ability to cooperate, and discuss his case.” Plotkin did “not concur” with the opinions of other experts that, because Gallup “lacked memory for the events of the alleged crime,” he is “unable to cooperate with his attorney.” Plotkin did not believe it “necessary for the defendant to have memory for the events to be properly and adequately represented.”

At trial, Plotkin said he had testified as a psychiatric expert on competency “[m]any hundreds of times.” Plotkin stated Gallup told him he had no memory of the actual crime, but he remembered his wife and her sister had gone to the bank that day. Plotkin testified he disagreed with Dr. Sahgal’s opinion that Gallup’s confabulation made him incompetent. In Plotkin’s view, confabulation was irrelevant in this case because Gallup “could come up with 20 different stories of what happened.” But “[i]f you asked him if he remembers specifically what happened, the answer is no.”

Plotkin testified he saw no evidence that Gallup could not “learn, process, and incorporate new information,” or that he “would not be able to cooperate rationally with his attorney.” Plotkin said if Gallup were shown evidence such as a police report or witness interview, he could “incorporate [that] information just fine.”

On cross-examination, Plotkin said he had not seen the reports by Drs. Bangston and Lareau. After being handed those reports and reading them, Plotkin testified he disagreed. Plotkin explained he had instructed Gallup to tell him just what he remembered, not what anyone else had told him; it was unclear

whether other evaluators had given Gallup the same instruction. Plotkin admitted he had not spoken with Gallup's criminal defense lawyers.

b. The trial court's ruling

The court commended the prosecution and the defense on their presentation of evidence. The court stated the defense had demonstrated Gallup had frontal lobe damage from his self-inflicted gunshot wound. The defense position, the court said, was Gallup was unable to assist his counsel with his defense because he confabulates due to amnesia. The court noted both parties' evidence demonstrated Gallup otherwise was "smart, lucid, engaging and knowledgeable about the court system and the court process" and that he had "a good recollection of everything except the day of the shooting and about 25 to 30 days following the shooting."

The court said it found Dr. Sahgal to be the most credible of the defense witnesses. The court stated Sahgal viewed confabulation as the "single hurdle to his opinion[] of competence" and Sahgal had said "it was a close question."

The court did not find Dr. Bangston "to be all that credible." The court observed she did not appear to be objective, but rather wanted to help Gallup and his counsel, and that "she didn't ask the defendant anything about what he recalled from the incident" because "she was concerned that [he] might say something incriminating." The court also noted that, when Gallup told Bangston he was not under the influence of alcohol, she "did not confront him" with the evidence that "hours later he was at a .15."

The court stated Dr. Lareau was highly trained and very competent, "[b]ut there were things about him that bothered [the court] a lot." The court noted Lareau testified Gallup told him "he recall[ed] everything right up to the time of the shooting"

but Lareau did not put this in his report. In the court's view, "had he put that in his report, that would have been contrary to the defense position."

As for the prosecution witnesses, the court said it did not "find Dr. Lloyd that helpful in that he had no contact with the defendant since his last interview, which was in 2008." Moreover, Lloyd "was not able to render an informed opinion as to whether the defendant was confabulating or had an accurate recollection of the events," as he did not discuss the facts of the case with Gallup.

The court found Dr. Kinney more credible than Dr. Lloyd even though her last contact with Gallup also was in 2008. The court noted Kinney "spent more time testing him" and her opinion was based on that assessment as well as "input from the defendant's treatment team" at Patton. The court stated Gallup "scored at least average on every test" Kinney administered and Kinney's opinion was Gallup "did not have any cognitive impairment that would render him incompetent."

The court found Dr. Plotkin qualified and credible. The court noted Plotkin "said that confabulation was not relevant to him because the defendant didn't confabulate to him."

Finally, the court stated the evidence showed Gallup to be "deceptive." The court said, "For example, he told one of the mental health experts that he had a good relationship with his wife, which we know is not true." The court continued, "I am not convinced that the defendant has no memory of the incident and that, therefore, [he] is confabulating. He did give what appears to be a cogent account of what occurred to Drs. Lareau and Plotkin and, again, it troubled me [that] it was not in Lareau's notes, about the details."

The court stated the defense's own evidence showed Gallup was "stubborn and obstinate because he will not even consider

what is in the police reports because he adamantly believes that he is innocent.” The court continued, “[I]t is true the defendant has given different stories of what occurred and then denies having given these . . . conflicting stories.” But, the court said, “I think it is as likely that he’s doing this because he is a difficult, stubborn, deceitful person.” The court added, “As it is, that he is confabulating, I think it could go either way.”

The court concluded, “[E]ven if he is confabulating due to amnesia, he can still receive a fair trial. The defense has access to all the People’s reports in this case. The defense can reconstruct what occurred before and during the incident, including the defendant’s blood alcohol level which could impact his criminal culpability and also then, an argument immediately preced[ing] the shooting which can also impact his criminal culpability.” Finally, the court stated, “I find that the defendant has not met his burden to show incompetence and the defendant is therefore deemed competent. Criminal proceedings are reinstated.”

4. *The murder trial*

Gallup testified on his own behalf at his April 2016 murder trial. Gallup said he remembered his wife coming home on July 5, 2003, having left at some point to cash a check. Gallup testified the next thing he remembered was “[w]aking up in Los Angeles County jail a month later.” When asked by his attorney if he had “any idea what led to [his] wife and [him] being shot,” Gallup responded, “I don’t think so. I don’t really have an idea.”

Gallup testified he remembered some things about that day: He got up late, took a bath, and watched television. He remembered July 5 was a Saturday, and noted the bank where his wife went to cash a check would have been “open half a day.” Gallup said his wife was mad at him when she got home

because he spent too much time with her sister. He testified the shooting happened “[p]robably about 30 minutes” after she came home. But, he said, he didn’t “remember anything after being shot.” It “[j]ust blanked [him] out from then on.”

Gallup testified he had no problem with his memory; he had “a good memory.” When asked, “So the only part of your memory that’s affected is when this murder happened?”— he answered, “Yes.” Gallup denied having shot his wife.

DISCUSSION

1. Substantial evidence supports the trial court’s conclusion that Gallup was competent to stand trial

The due process guarantees of both the federal and state Constitutions forbid the trial of a criminal defendant while he is mentally incompetent. (*Buenrostro, supra*, 6 Cal.5th at p. 385.) Section 1367 governs the determination of whether a criminal defendant is competent to stand trial. (*Buenrostro*, at p. 385.) Under section 1367, a defendant is mentally incompetent “ ‘if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.’ ” (*Buenrostro*, at p. 385.)

“The law presumes a person is competent to stand trial. ([] § 1369, subd. (f).) ‘When the defendant puts his or her competence to stand trial in issue, the defendant bears the burden of proving by a preponderance of the evidence that he or she lacks competence.’ ” (*Buenrostro, supra*, 6 Cal.5th at p. 387 quoting *People v. Mendoza* (2016) 62 Cal.4th 856, 871; *Medina v. California* (1992) 505 U.S. 437, 445-448 [allocation of burden of proof to a criminal defendant to prove incompetence does not violate procedural due process].)

“On appeal a finding of competency to stand trial ‘cannot be disturbed if there is any substantial and credible evidence in the

record to support the finding.’ ” (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1111.) “[A]n appellate court must view the record in the light most favorable to the verdict [that a defendant is mentally competent] and uphold the verdict if it is supported by substantial evidence.” (*People v. Marshall* (1997) 15 Cal.4th 1, 31.) “Evidence is substantial if it is reasonable, credible, and of solid value.” (*Ibid.*)

Gallup contends there was substantial evidence of his incompetence to stand trial. He cites authority for the proposition that, if there is substantial evidence a defendant is incompetent, the court must conduct a competency hearing. Here, of course, the trial court *did* conduct a hearing—a full multiple-day court trial with a number of witnesses who testified and were cross-examined.

The issue before us is not whether there was substantial evidence that Gallup was incompetent; it is whether substantial evidence supports the trial court’s conclusion that Gallup was *competent*. “When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination.” (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) “If our review of the record shows that there is substantial evidence to support the judgment, we must affirm, even if there is also substantial evidence to support a contrary conclusion and the [trier of fact] might have reached a different result if it had believed other evidence. [Citation.] Accordingly, if the evidence is such that rational people could reach conflicting conclusions, there is by definition substantial evidence to support the judgment.” (*People v. Riley* (2015) 240 Cal.App.4th 1152, 1165-1166.)

As noted, six experts testified at the competency trial. Three opined Gallup was incompetent and three opined he was competent. All six agreed Gallup had a more than adequate understanding of the court process and the roles of his lawyer, the prosecutor, the judge, and the jury. The experts also agreed that amnesia alone does not render a defendant incompetent. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 809; *People v. Amador* (1988) 200 Cal.App.3d 1449, 1454.) The sole area of disagreement concerned the confabulation issue. The experts disagreed about whether Gallup was confabulating at all and whether—even if he were—he was incapable of cooperating with his trial lawyer or, instead, could receive a fair trial given that defense counsel had abundant information about the facts of the crime.

The trial court watched and listened to each witness, judging the credibility of each. The court also observed Gallup during tens of pretrial conferences over a 12-year period, including his interactions with both his court-appointed counsel and the privately-retained lawyer who later replaced him. The trial court detailed the reasons for the weight it gave to each expert's testimony, reports, and opinions.

The court discussed Dr. Kinney's extensive testing of Gallup and her consideration of input from his treatment team. The court said it found Dr. Plotkin "to be qualified and credible." As noted, Plotkin explained that any confabulation by Gallup did not render him incompetent; if he had no memory of the shooting as he claimed, he nevertheless could "incorporate" information from police reports and witness interviews. The court was not convinced Gallup had no memory of the incident. Moreover, the court seemed to conclude the rigidity reported by Gallup's lawyer resulted from Gallup's stubbornness

rather than his cognitive disorder. Substantial evidence supports the trial court's conclusion.

2. *The trial court did not deny Gallup his right to a jury trial on competence*

Gallup contends he was denied his right to a jury trial on competence. Gallup asserts "[t]he record is devoid of either appellant or his attorney waiving appellant's statutory right to a jury trial." Gallup is mistaken.

As noted, at the first trial on competence, in March 2006, the trial court asked the parties, "Do you agree the trial can be heard to the court rather than to a jury?" Both counsel answered yes. Years later—on April 9, 2015—the parties appeared before the court. Gallup was personally present with two attorneys. The court asked, "Have you two decided on a date to set the restoration of [competence] trial?" The prosecutor responded the parties were asking for June 15 and 16, 2015. There was some discussion of the availability of the expert witnesses. The court then asked the prosecutor, "Did you do any research as to whether this can be a court trial or a jury trial?" The prosecutor answered, "I spoke to our psychiatric section, I should say, and they indicated that it's a court trial." The court then asked Gallup's counsel, "Do you accept that?" Gallup's attorney answered, "I accept it. Yes."

Gallup contends his counsel's statement meant only that he "accept[ed]" the prosecutor's (erroneous) statement that the parties had no right to a jury on competency. We decline to speculate about what counsel meant when he said, "I accept it. Yes." As Gallup recognizes, there is no constitutional right to a jury trial in a competency proceeding. The right to a jury in section 1368 proceedings is a creature of statute. (*People v. Masterson* (1994) 8 Cal.4th 965, 969.) Counsel may waive this statutory right to a jury trial in a competency proceeding, even

over the defendant's objection. Nor need the court advise the defendant of his statutory right to a jury trial. (*Id.* at pp. 971-972; see also *People v. Lawley* (2002) 27 Cal.4th 102, 134 [*Masterson* "rejected the argument that the trial court was required to advise the defendant of his right to a jury determination of his competency, given the lack of a constitutional foundation for the right"; reversal not required even though issue of jury versus court trial "evidently was not raised on the record"].) We "will not presume defendant's attorney was unaware of the availability of a jury." (*Lawley*, *supra*, at p. 134.)

3. *The prosecution had no obligation to renew its earlier offer to Gallup of a plea deal after the court found him competent*

At the outset of the competency trial in September 2015, the prosecutor told the court the People had offered Gallup a plea to voluntary manslaughter, with admission to a gun enhancement, for a total of 14 years in the state prison.⁸ Gallup's counsel responded, "[M]y client states he will not accept the People's offer. I asked him if he would be willing to make a counteroffer, to plead to the same offenses [*sic*] for time served with the understanding that he would essentially be released and serve probation [*sic*] or parole, depending on exactly how it's calculated. He stated that he would not make such a

⁸ Gallup's appellate brief erroneously states the offer was 17 years. It was 14, apparently consisting of the upper term of 11 years for voluntary manslaughter plus three years for the use of the firearm (probably the low term under section 12022.5, subd. (a)).

counteroffer. He's not willing to make any counteroffer.”⁹ Counsel went on to say he believed Gallup to be incompetent, so “even if [Gallup] said he would accept the offer or would make a counteroffer,” counsel still would have a doubt as to Gallup’s competence.

On appeal, Gallup argues “fundamental fairness dictates” that, if we find substantial evidence of Gallup’s competency, “he be given the opportunity to reconsider the plea agreement that was offered by the prosecution.” Gallup cites no authority for this novel and surprising assertion. First, the People disputed, and still dispute, the premise of Gallup’s argument: that he was incompetent at the outset of his competency trial. The prosecution contended—and the court ultimately concluded—that Gallup was competent. Second, the prosecutor had no obligation to make *any* offer to resolve the case for less than the 50 years to life Gallup faced for murdering his wife. “[T]here is no constitutional right to a plea bargain.” (*People v. Trejo* (2011) 199 Cal.App.4th 646, 655.)

4. *We remand for the trial court to exercise its discretion under Senate Bill No. 620*

The trial court imposed a term of 25 years to life for the firearm enhancement under Penal Code section 12022.53, subdivision (d). After briefing was complete in this case, our Legislature passed Senate Bill No. 620 (SB 620), effective January 1, 2018. SB 620 gives trial courts authority to strike

⁹ Gallup told Dr. Sahgal in 2005 that he would “never” plea bargain. Gallup told Sahgal, “I’m 57 and even a plea to 10 years leaves me an old man when I would get out.” At the time, Sahgal wrote that Gallup’s understanding of the charges against him, the plea bargaining process, and the consequences of conviction was “sophisticated and incorporate[d] collateral social data.”

section 12022.53 firearm enhancements in the interest of justice. The amendment to section 12022.53 applies to cases—such as Gallup’s—that were not final when the amendment took effect. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507.)

We asked Gallup’s counsel to address at oral argument whether Gallup is asking us to remand the case for SB 620 consideration. Counsel confirmed Gallup does make that request and the Attorney General concedes remand is appropriate. Accordingly, we remand the case to allow the trial court the opportunity to exercise its sentencing discretion under the amended statute. We express no opinion about how the court should exercise its discretion. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 423-424, 428.)

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to consider, at a hearing at which Bill Lawrence Gallup has a right to be present with counsel, whether to exercise its discretion to strike the firearm enhancement imposed in Count 1 under Penal Code section 12022.53, subdivision (d). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

MURILLO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.